Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

SHAMS Q. NAJM,

Petitioner,

v.

SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

SHAMS Q. NAJM
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In Pro Per

QUESTIONS PRESENTED

1. Does determination by summary judgment of an employee's action for denial of employment based upon petitioner's race and age deprive petitioner of constitutional due process of law?

2. Does an act by an employer constitute an unfair labor practice against an employee in violation of the Taft Hartley Amendments National Labor Relations Act and the Railway Act deprive petitioner of constitutional due process and equal protection of the law?

3. Is an African American citizen of the United States and over the age of 40 and a resident of the State of California ineligible for public employment as a matter of law?

4. Does the principle of equal protection of the law entitle a public employee, in an action against a public entity, to appointed counsel, compensated by the public entity, where the public entity is represented by private appointed and compensated counsel?

LIST OF PARTIES

Shams Q. Najm, Petitioner

Superior Court of Los Angeles, Respondent

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OPINION BELOW

The opinion of the Court of Appeal of the State of California Second Appellate District. The Trial Court granted summary judgment in the county's favor and thereafter awarded the county attorney fees and costs. Najm appeals the judgment. We affirm the judgment, except we dismiss the purported appeal of the order granting the county attorney fees and costs. The original opinion of the Court of Appeal is unreported.

STATEMENT OF JURISDICTION

The Court of Appeal's judgment was entered on March 20, 2006. Order, opinion or decision became final July 6, 2006. Request for Judicial Notice denied. Petition for Review denied in the Supreme Court of California June 28, 2006. The jurisdiction of this court is invoked under 28 USC § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The supremacy clause of the Constitution provides in relevant part: "[T]he Laws of the United States . . . shall be the supreme law of the land . . . anything in the constitution or laws of any state to the contrary notwithstanding." U.S. Const. Art. VI, Cl. 2.

STATEMENT OF THE CASE

The appeal here is presented from a summary judgment of the Los Angeles County Superior Court, the Honorable David A. Chaffee of the Orange County Superior Court, presiding by special assignment.

Petitioner, Shams Q. Najm, an African American/black person, over the age of forty (40) is employed as an Investigator Aide with the Los Angeles County Probation Department, who applied for a job as a Probate Investigator with the Los Angeles Superior Court Department of Human Resources (personnel department). His application was denied. Petitioner was given inconsistent reasons why his application was denied, including that he does or does not have the experience for the job. Petitioner met all the qualifications for the position.

On August 8, 2001, Petitioner applied for the Probate Investigator job, exam #C9754C, with the Respondent Superior Court of California, County of Los Angeles, located at 111 North Hill Street, Los Angeles, California 90012.

The selection requirements stated in the job notice were: "Graduation from an accredited college with a bachelor's degree in social work, psychology, gerontology, education, nursing or other closely related field – and – three years experience performing field investigations as a probation or parole officer, social worker, or other closely related occupation – and – one year field experience working with dependent and elderly adults and/or children – and demonstrated proficiency working with computers including Word and/or WordPerfect software to prepare clear and concise written reports."

Although it was readily evident that the Petitioner met all of these qualifications, as stated in his application and documentation, the Respondent summarily denied his application in a letter dated August 22, 2001, upon the pretext that the Petitioner did not meet any of the four selection requirements.

The rejection letter stated: "We appreciate the time and effort you devoted to presenting your qualifications. If you have any questions regarding this notice, please telephone Jennifer Revuelta, in the Recruitment and Selection Unit, at (213) 893-9767 within ten (10) business days from the postmark of the envelope."

On August 23, 2001, the Petitioner timely telephoned Jennifer Revuelta, of the court's human resources staff, to discuss the selection requirements. During the conversation, Ms. Revuelta conceded that without reviewing any new documentation, that the Petitioner's application did, in fact, indicate that he had the required educational degree, J.D. Law degree, Probate Administration Paralegal Certificate, and Conservatorship Certificate, that his job experience as an investigator gave him the required three years of probation/social worker type field experience. However, Petitioner did not have one year of field experience working with dependent and elderly adults and/or children, and that Petitioner did have the required computer skills. The only one of the four requirements that Ms. Revuelta said the Petitioner did not have was the one year of field experience working with children. Petitioner pointed out to Ms. Revuelta that the requirement was an "either/or" working with the elderly (conservatorship) or with children (guardianship). Although the Petitioner's application clearly indicates he had ten years of experience working with the elderly and over one year experience

working with blind children, Ms. Revuelta refused to consider that experience and stated that they were looking for someone with experience working with children.

Before ending the telephone conversation, Petitioner asked if there was any type of an appeal process that he could utilize. She said no.

Because of the false reasons for rejection of the Petitioner's qualifications (perjury) and the lack of an appeal process in writing Petitioner should be entitled to cross examination of Ms. Revuelta in open court.

License: At the time of appointment, candidate must have a valid California Class "C" Driver's License and use of private transportation to travel throughout Los Angeles and neighboring counties; reimbursable mileage averages 500 or more miles per month.

Respondent, on Summary Judgment Motion, objected to Petitioner submitting his mileage reports in his position as an investigation aide for the Los Angeles County Probation Department over a four-year period (2-1-99 thru 8-13-02) as irrelevant (Evid. Code § 350). Only relevant evidence admissible. No evidence is admissible except relevant evidence. This evidence is clearly relevant and should be admitted. Also, bank letters 8-21-02, 7-12-02 produced by U.S. Equal Employment Opportunity Commission: "There is no written documentation which explains the appeal process." Judge David Chaffee sustained Respondent's motion to have above evidence excluded. This is clearly prejudicial error.

Section 210 Relevant Evidence:

> "Relevant evidence means evidence, including evidence relevant to the credibility of a witness

> or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact, that is of consequence to the determination of the action."

This employment discrimination case was filed with the Equal Employment Opportunity Commission for a charge of age and race discrimination based on age and race discrimination within one year of the date discrimination was committed by the Respondent.

This case comes under the Fair Employment and Housing Act (FEHA). Racial discrimination in violation of the Civil Rights Act of 1964 (42 USCA Section 2000e, et seq.) and 42 USCA Section 1981 and the Age Discrimination in Employment Act (ADEA).

All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, be parties, give evidence and to full and equal benefit of all laws and proceedings for the security of persons and property or is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind and to no other (42 USCA Section 1981). The law establishes that freedom from job discrimination on specified grounds, including [national origin]. This is a civil right. It declares that such discrimination is against public policy (§ 12920) and an unlawful employment practice (§ 12940) [4].

> [4] Section 12940 provides: "It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California. [11](a) For an employer, because of

> the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of any person, to refuse to hire or employ the person . . . or bar or to discharge the person from employment . . . or to discriminate against the person in compensation or in terms, conditions or privileges of employment . . . "

The central purpose of the Equal Protection clause of the 14th Amendment is the prevention of official conduct discrimination on the basis of race. *Washington Mayor of Washington, D.C. v. Davis*, 426 U.S. 229; 96 S.Ct. 2040 (1976).

Desirable qualifications:

- Experience dealing with people in locked or secured board and care facilities. Petitioner Najm has worked 10 years for the State of California Long Term Care Ombudsman Program in locked and secure skilled nursing care facilities.
- Knowledge of medical terminology, including understanding medical diagnosis and various types of effects of prescription drugs. Petitioner Najm has worked with doctors, psychiatrists, and social workers regarding residents of skilled nursing facilities medical treatment and medications they are taking.
- Ability to interview children and assess their needs. Petitioner Najm has one-two years experience working with blind children as a recreation leader at the Foundation of the Junior Blind.

- Ability to interview and communicate with a variety of people from different backgrounds. Petitioner Najm has demonstrated these skills even interviewing and communicating with a variety of people as a paralegal with the Orange County Legal Aid Society for two years and in his present position as an investigation aide with the County of Los Angeles Probation Department.

- Fluency in Spanish, in addition to English. Petitioner Najm had two years of Spanish language in high school.

For a prima facie case of race discrimination, a Petitioner must prove that: (1) He is a member of a protected class. Petitioner Najm is black/African American; (2) He was qualified for the position. Petitioner Najm fits the minimum qualifications for the position; (3) He was not promoted to a position eventually filled by a non-black/African American candidate. There is no question that Petitioner Najm has established a prime facie case of discrimination. Petitioner was facially more qualified for the position than the applicant who was hired; (4) Either the position was filled by someone not in the protected class, or the person was not promoted because of his race. See *Rutherford v. Harris County, Texas,* 197 F.3d 173, 179 (5th Cir. 1999)

The Respondent, County of Los Angeles Superior Court Department of Human Resources, asserts a racially non-discriminatory reason for the failure to promote Petitioner Najm. The candidate failed to complete the hiring process. Respondent cites *Ibarbia v. Regents of the University of California* 191 Cal.App. 3d 1318 (1987). In that case, the selection committee determined that Ibarbia was qualified for an interview. Ibarbia declined the interview. Petitioner

Najm's application was rejected. Even though he was fully qualified, he was not chosen or offered an interview.

Congresswoman Diane Watson of the 33rd Congressional District intervened on the Respondent's behalf. Petitioner Najm submitted a letter of reference to the County of Los Angeles Superior Court from Local 685, the Los Angeles County Probation Officers Union, the official bargaining unit recognized by the County of Los Angeles as the official bargaining unit. The letter was signed by Ms. Anita Olivares, Vice President Pre-trial Service Bargaining Unit (an investigator with Pre-Trial Services). The letter stated Petitioner Najm is a member in good standing and in his present position as an investigation aide the work is field related. An official Los Angeles County job description of the position was submitted along with the letter. Respondent violated Los Angeles County Probation Department personnel policy when they contacted manager/supervisor Frank McCormick, Pre-Trial Services Bail Deviation Program, for a reference regarding Petitioner Najm. This constituted an unfair labor practice under the Taft-Hartley Amendments of the National Labor Relations and Railway Act, depriving the Petitioner of his U.S. Constitutional 5th Amendment rights of due process and 14th Amendment rights of equal protection by not recognizing Petitioner's bargaining unit agreement and thereby breached the contract of an implied covenant to bargain in good faith.

The National Labor Relations Act declares that "employees shall have the right of self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection" (29

USCA § 157, 9 FCA Title 29, § 157). To assure employees the full enjoyment of these rights, the act declares in § 8 that it shall be an unfair labor practice for an employer, inter alia, to interfere with, restrain, or coerce employees in the exercise of these rights (29 USCA § 158(1) 9 FCA Title 29, § 158(1)); to dominate or interfere with the formation or administration of any labor organization (29 USCA § 158(2) 9 FCA Title 29, § 158(2)); by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization (29 USCA § 158(3) 9 FCA Title 29, § 158(3)); or to refuse to bargain collectively with the duly chosen representatives of his employees (29 USCA § 158(5) 9 FCA Title 29, § 158(51)).

RULING ON SUMMARY JUDGMENT MOTION

The sole issue is whether the trial court erred in granting Respondent's motion for summary judgment.

A Petitioner may establish a claim of employment discrimination by the trial analysis first enumerated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1981). Although *McDonnell Douglas* was a Title VII case, this approach has been applied in ADEA cases. *Thornbrough v. Columbus and Greenville Railroad Co.*, 760 F.2d 633, 638-639 (5th Cir. 1985), held that material issues preclude summary judgment. In general, summary judgment is an inappropriate tool for resolving claims of employment discrimination which involve nebulous questions of motivation and intent (Fed. Rules of Civ. Proc. Rule 56(c), 29 USCA; age discrimination in Employment Act of 1967, Section 2-17 – amended, 29 USCA Section 621-634). If any

facts are in dispute in an employment discrimination suit, summary judgment is generally inappropriate.

It has been held that any indication of discriminatory motive . . . may suffice to raise a question that can only be resolved by a fact finder, and for that reason summary judgment for the Respondent will ordinarily not be appropriate on any ground relating to the merits because the crux of a Title VII dispute is the exclusive factual question of intentional discrimination. *Lyons v. England,* 307 F.3d 1092 (9th Cir. 2002).

The court is required to "accept the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them." *Hastings v. Department of Corrections*, 110 Cal.App. 4th 963, 970 (2003). The court is also obligated to review the facts in the light most favorable to Petitioner and resolve all factual disputes in Petitioner's favor. *Mandell v. County of Suffolk*, 316 F.3d 368, 377 (2nd Cir. 2002). In Petitioner Najm's case, none of this was done.

REASONS FOR ALLOWANCE OF THE WRIT

A factual dispute is natural if it bears on an essential element of the Petitioner's claim; and is genuine if a reasonable jury could find in favor of the non-moving party. *Coverland Greenspring Dairies v. Pan Milkway Mktg. Bd.,* 298 F.3d 210, 210 (3rd Cir. 2002) (quoting *Abraham v. Roso*, 183 F.3d 279, 287 (3rd Cir. 1999)). There are genuine issues of material facts about the Respondent's excuses for not hiring Petitioner Najm. There are circumstances that suggest that Petitioner Najm did not get the position be cause of some discriminatory motives. Petitioner Najm has

suffered an adverse employment action. Petitioner Najm has a prima facie case for discrimination. Also, attorney's fees are not recoverable for the Respondent under the Age Discrimination in Employment Act, so says the Congress of the U.S. Petitioner Najm's attorney's fees of $65,280 plus $1,106.54 (total $66,386.54) are excessive.

1. THE DECISION BELOW IS INCORRECT

An employment discrimination case based on age and race had been filed in the County of Los Angeles which thereafter was sent to the Superior Court of Orange County in Santa Ana, California for a hearing on Los Angeles County's motion for summary judgment or in the alternative for summary adjudication of issues in case #BC294436. Petitioner Najm opposed the motion by having served and filed opposition to the motion. Upon the date of the hearing on the motion for summary judgment in Department C25 of the Orange County Superior Court at Santa Ana, California, Petitioner Najm was confronted by the sight of a large picture of a shabbily dressed and deranged African American male person which was posted on the file cabinet of the courtroom. Petitioner Najm's case was put on calendar last so that Petitioner Najm had to endure that sight for three hours.

Prejudice of judges pertains to the mental attitude toward a party to the litigation, not entirely toward the subject matter which is involved. (30 AM J. Rev. ed. Judges § 170). A hostile feeling or a spirit of ill will, or undue friendship or favoritism, directed in favor or against one of the litigants. *Haslam v. Morrison*, 113 Utah 14, 190 P.2d 520 (1948).

Due to the unyielding machinery of white supremacy, white racism and prejudice, the Honorable Judge David R. Chaffee has not upheld his oath of office or a court officer, nor has he exercised his duties in a professional manner.

The judicial system is premised upon the principle that favoritism must not be shown throughout the process of adjudicating the right of any citizen or party to litigation.

Favoritism may be depicted by a brief example. Suppose a man comes into a meeting wearing a gold ring and fine clothes and a poor man enters wearing shabby clothes. If special attention is visited upon the man wearing the fine attire and the host says, "Here's a good seat for you," but to the poorly dressed man says, "You sit on the floor at my feet," or is commanded to "stand aside and keep silent," have you not discriminated between these two men? Has not disparaging conduct and evil thoughts then and there been visited upon the poor man? As an African American male, Petitioner Najm did experience intensely the perceived presence of racial discrimination resulting from the presence of such a poster in the courtroom during his day in court.

Complaint on Honorable David Chaffee, Judge, filed with the Commission of Judicial Performance May 11, 2006, 455 Golden Gate Avenue, Suite 14400, San Francisco, California 94102; telephone (415) 557-1200.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX A

2006 WL 689305

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

SHAMS Q. NAJM, Plaintiff and Appellant, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES, Defendant and Respondent.	B176724 (Los Angeles County Super. Ct. No. BC294436) (Filed Mar. 20, 2006)

Appeal from a judgment of the Superior Court of Los Angeles County, David R. Chafee, Judge. Affirmed in part and dismissed in part.

Shams Q. Najm, in pro per., for Plaintiff and Appellant.

Paul, Plevin, Sullivan & Connaughton, Fred M. Plevin and Michael R. Minguet for Defendant and Respondent.

INTRODUCTION

Plaintiff and appellant Shams Q. Najm applied for a job with defendant and respondent the Superior Court of the State of California, County of Los Angeles (the County). The County rejected Najm's application. Claiming that his application was rejected because of his race and age, Najm sued the County for race and age

discrimination. The trial court granted summary judgment in the County's favor, and thereafter awarded the County attorney fees and costs. Najm appeals the judgment. We affirm the judgment, except we dismiss the purported appeal of the order granting the County attorney fees and costs.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

A. *The County posts a job bulletin for an investigator.*

In June 2001, the County posted a job bulletin for a probate court investigator, whose duties would be to investigate conservatorship and guardianship cases, to communicate with, assess, and work with persons subject to a conservatorship or guardianship, and to write reports of findings and recommendations. The position required a bachelor's degree in social work, psychology, gerontology, education, nursing or other closely related field; three years' experience performing field investigations as a probation or parole officer, social worker or other closely related occupation; one year of field experience working with dependent and elderly adults and/or children; and demonstrated proficiency working with computers including Word and/or WordPerfect software to prepare clear and concise written reports. "Desirable qualifications" were "experience dealing with people in locked or secured board and care facilities; knowledge of medical terminology, including understanding medical diagnosis and various types and effects of prescription drugs; ability to interview children and assess their needs; ability to interview and communicate with a variety of people from different

backgrounds; and fluency in Spanish, in addition to English."

The job examination consisted of two parts: (I) A qualifying evaluation of education, training, and experience based on the application materials submitted, and (II) an interview, to which only the most qualified applicants would be invited.

B. *Najm submits an application for the investigator position.*

Najm was born in 1945 and is Black. He applied for the probate court investigator position. In his written application, Najm stated he had a B.A. in social science. Since August 1998, he worked for Los Angeles County Probation Department-Pretrial Services Bail Deviation as an investigator aide. He described his duties as follows: "A complete criminal history on the defendants compiled along with police agency comments. All of the information is furnished to the on duty commissioner who makes a decision on the matter of bail." In his resume and in a supplemental questionnaire which asked him to describe his field investigative experience and investigative report writing experience, he submitted substantially the same response.[1] He added that he wrote 80-100 reports of an average length of one-to-two paragraphs per month. He also volunteered at Wise Senior Services, where he "advocate[d] on behalf of the elderly and dependent residents in

[1] "Interview defendants. A complete criminal history is compiled along with police agency comments. All of the information is furnished to the on duty commissioner who makes a decision on the matter of bail. . . . Gather the facts as to why the defendant was arrested."

skilled-nursing care facilities." His work at Wise also required him to "interact with the physician and psychologist of the resident regarding treatment/diagnosis/prescription." Najm did not speak, read or write any language other than English fluently.

By signing the application, Najm authorized "all employers and institutions to release to the Los Angeles Superior Court confidential information concerning my employment."

Also, as part of the application, Najm filled out an Equal Opportunity Employer Questionnaire, which requested he identify his race and date of birth.

C. *The County rejects Najm's application.*

By a letter dated August 22, 2001, the County informed Najm it could not accept his application because he did not meet the minimum experience requirements for the classification. He was told to direct any questions to Jennifer Revuelta, who was the human resources employee responsible for processing responses to the bulletin.

One week later, on August 29, 2001, Congresswoman Diane Watson sent a letter on Najm's behalf that requested the County to contact Najm to clarify the job requirements he did not meet. The County responded to Najm on September 18 by a letter that said Najm did not satisfy the requirements concerning field investigations. Najm's field investigation and investigative report writing experience with the probation department was nonqualifying because it lacked "depth and breadth" as compared to the activities performed by social workers and probation and parole officers. Investigator aides such as Najm rarely

go into the field, do not assess clients' physical and emotional well-being, and do not make independent judgments. The letter went on to state that although Revuelta had told Najm he lacked one year of field experience working with dependent and elderly adults and/or children, she now agreed that he satisfied that job requirement. Nonetheless, Revuelta had also told him he lacked the three years' field experience.

Over five months later, on February 28, 2002, Congresswoman Watson again wrote to the County stating that Najm remained "confused" as to why his application was not accepted. The letter further stated that Revuelta told Najm that the sole reason his application was denied was his lack of one year field experience with dependent and elderly and/or children. The letter also attached documents. The first document was the job bulletin for Najm's investigator aide position. That bulletin described his duties as "the more routine and less complex investigative activities." The second document, a flyer for Najm's job, more fully described the job requirements.[2] The third

[2] It said, in part: "Interviews persons in custody to record and verify information on applications for release on own recognizance and develops investigatory leads; contacts individuals to determine the accuracy of a defendant's statements, general reputation, character, employment history, community and family ties; confers with law enforcement officers to determine the nature of the instant offense and the defendant's level of participation in the offense; confers with various agencies to gather information pertinent to the release decision; reviews automated criminal history information to determine a defendant's criminal history; investigates and evaluates information to determine a defendant's potential threat to the community and likelihood of appearing in court when required, if released on own recognizance; analyzes all significant factors and information gathered during investigations to come to logical conclusions and prepares

(Continued on following page)

document was a letter from the probation officer's union stating that Najm was a member in good standing and that his duties as an investigator aide were fieldwork related and were not limited to the duties listed in the investigator aide job bulletin.

On March 21, 2002, the County, based on the indication in the union's letter that Najm's field work was more extensive than his job description indicated, stated it would reevaluate Najm's application. To that end, the County asked Najm to "detail his qualifying experience" and describe his fieldwork "with enough specificity to allow for a thorough reevaluation." The County also asked that any duties Najm performed that he believed to be at the level of a probation, parole officer or social worker be verified by his manager, Frank McCormick (Director, Pre-Trial Services).

Congresswoman Watson again responded on Najm's behalf on April 30, 2002. Najm did not believe further reevaluation was necessary, and he believed he should be allowed to take the exam.

On June 4, 2002, the County responded. It had contacted McCormick to confirm that Najm's duties as an investigator aide were fieldwork related and not limited to the duties listed in the job specification. McCormick would not concur with that statement. He instead said Najm did not go into the field to perform investigations, but rather performed standard investigator aide duties. Therefore, the County concluded that Najm was not qualified for the position. The County, nonetheless, said that if Najm

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written reports with a recommendation . . . ; testifies in court when required."

wanted to submit qualifying experience, he could do so with an acknowledgement by his manager. Najm never submitted any additional materials.

The County eventually hired Dorayne Salas for the position. Salas has a B.A. in social work, and she was a social worker for the Department of Children and Family Services (DCFS), which job required her to go into the field to interview minors, parents, caretakers, school and medical personnel, and counselors. As a part of her job, Salas wrote about 8-10 reports per month averaging 8-15 pages, assessed potential child abuse, created case plans, monitored children's status in foster care and parents' compliance with court orders, testified in court, and managed cases. Her experience working with clients with dementia consisted of monitoring the use of psychotropic drugs by minors. Salas speaks, reads, and writes English and Spanish.

II. Procedural background.

A. *Najm sues the County.*

Najm filed a charge of race discrimination with the Department of Fair Employment and Housing on May 30, 2002 that was referred to the Equal Employment Opportunity Commission. That same day, FEHA issued its right to sue letter. Najm then filed an amended charge, dated August 24, 2002, that alleged race *and* age discrimination.

Najm filed the complaint at issue on April 22, 2003. It alleged a single cause of action for violation of the Fair Employment and Housing Act (FEHA) based on disparate treatment on the basis of race and age.

B. *The County moves for summary judgment.*

In its motion for summary judgment or, in the alternative, summary adjudication, the County argued that Najm could not establish a prima facie case of race and age discrimination, the County had a legitimate, nondiscriminatory reason for rejecting Najm's application, and there was no evidence of pretext. The County also argued that Najm had not exhausted his administrative remedies as to his age discrimination claim.

In opposition to the motion, Najm submitted his declaration. He reiterated he was qualified for the job. He also said that after his application was denied, he spoke to Revuelta, who told him he had the required degree, computer skills, and three years' field experience, but that he lacked the one year field experience working with children. The County contacted McCormick, who was not his immediate supervisor, without his consent. He attached to his declaration travel logs to show he goes into the field.

He also submitted documents that the County had submitted to the EEOC. In one of those documents, Cynthia Banks, the Superior Court's director of human resources, stated that their receptionist receives applications and records information from equal opportunity questionnaires. Applications are then forwarded to the analysts, who in this case included Revuelta, who remove and shred the questionnaires. Banks also said that Revuelta did not know Najm's race when she reviewed his application.

C. *The trial court grants summary judgment, and Najm appeals.*

The trial court issued its order granting the County's summary judgment motion on May 13, 2004. The court held that Najm had not established a prima facie case of race or age discrimination because Najm failed to complete the application process, and he was not qualified for the position sought. Also, the person hired for the job was more qualified and there was no evidence of a discriminatory motive.

Before judgment had been entered, Najm prematurely filed, on July 12, 2004, a notice of appeal from the "order granting summary judgment." Thereafter, on July 27, 2004, the trial court granted the County's motion for attorney fees and costs based on 998 offers the County had made but Najm rejected. The court entered judgment on September 23, 2004.

DISCUSSION

I. Standards of review in motions for summary judgment in employment discrimination actions.

"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) Thus, summary judgment is granted when a moving party establishes the right to entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment meets its burden of showing there is no merit to a cause of action if that party shows that one or more

elements of the cause of action cannot be established or there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2).) Once the defendant has made such a showing, the burden shifts to the plaintiff to show a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. (*Aguilar v. Atlantic Richfield Co., supra,* at p. 849.) If the plaintiff does not make such a showing, summary judgment in favor of the defendant is appropriate.

On appeal from a summary judgment, we make "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law. [Citations.]" (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222-223.) We "review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.]" (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).)

Employment discrimination cases brought under Government Code section 12940, subdivision (a),[3] may

[3] Government Code section 12940, subdivision (a), provides, "It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California: (a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program

(Continued on following page)

involve a claim of "disparate treatment," which "is *intentional* discrimination against one or more persons on prohibited grounds. [Citations.]" (*Guz, supra,* 24 Cal.4th at p. 354, fn. 20.) Because direct evidence of discriminatory motive is ordinarily unavailable, California courts have adopted a "three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination . . . based on a theory of disparate treatment. [Citations.]" (*Id.* at p. 354.)[4] Under the *McDonnell Douglas* test, the plaintiff-employee must first set forth sufficient evidence to establish a prima facie case of discrimination. (*Guz, supra,* at pp. 354-356.) To establish a prima facie case of discrimination, plaintiff must show that (1) he or she was a member of a protected class, (2) he or she was qualified for the position he sought or was performing competently in the position he or she held, (3) he or she suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggesting a discriminatory motive. (*Id.* at p. 355; see also *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802 [a person who has been rejected for a job opening can establish a prima facie case of race discrimination by showing that (1) he or she was a member of a racial minority, (2) he or she applied and was qualified for an available job, (3) he or she was rejected despite his or her qualifications, and (4) the position thereafter remained open and the employer continued to seek applications from persons with similar qualifications].)

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leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment."

[4] California courts look to federal precedent when interpreting our state employment discrimination laws. (*Guz, supra,* 24 Cal.4th at p. 354.)

By establishing a prima facie case, plaintiff creates a presumption of discrimination. The burden then shifts to defendant to establish a legitimate, nondiscriminatory reason for the adverse employment action. (*Guz, supra,* 24 Cal.4th at pp. 355-356.) If defendant satisfies its burden, then the presumption of discrimination disappears, and plaintiff must attack defendant's proffered reasons as pretext or offer other evidence of discriminatory motive.

II. Najm failed to establish a prima facie case of race and age discrimination.

We need not here address whether the County established a legitimate nondiscriminatory reason for rejecting Najm's application because Najm never established his prima facie case of race and age discrimination, and therefore there was no presumption of discrimination that the County had to rebut.

A. *Najm failed to complete the application process and was not qualified for the job.*

To establish his prima facie case, Najm had to show that he completed the application process. (*Ibarbia v. Regents of University of California* (1987) 191 Cal.App.3d 1318.) In *Ibarbia,* the plaintiff applied for a job, but his application was initially rejected because, among other things, he lacked the appropriate background and training. Plaintiff sent a letter of protest, and his application was reevaluated. Upon reevaluation, defendant offered the plaintiff an interview, which the plaintiff declined. The court held that plaintiff failed to complete the application process. (*Id.* at p. 1329; see also *Levy v. Regents of University of California* (1988) 199 Cal.App.3d 1334 [plaintiff

who said he "might" be interested in one job but never followed up on it and who failed to submit letters of reference for a second job failed to complete application process]; *Tagupa v. Board of Directors* (1980) 633 F.2d 1309 [plaintiff who merely submitted his resume for a position without setting forth those areas of his background that fit the advertised qualifications failed to apply for the job, and hence could not establish a prima facie case of discrimination].)

Here, Najm submitted his application, which was initially rejected. After Congresswoman Watson forwarded various documents, including one that implied Najm's duties as an investigator aide are fieldwork related, the County said it would re-evaluate Najm's application. The County therefore asked Najm to "detail his qualifying experience" and describe his fieldwork "with enough specificity to allow for a thorough reevaluation." The County also asked Najm to have his manager verify any duties he performed that he believed to be at the level of a probation or parole officer or social worker. In asking Najm to submit this information, the County was simply asking Najm to detail his three years' field experience, as his application failed to demonstrate he had any qualifying experience. Najm, however, never submitted any further information. Instead, he said he didn't believe reevaluation was necessary. Based on these undisputed facts, Najm failed to compete the application process.

But even if we were to assume that Najm completed the application process, he did not establish he was qualified for the job. Instead, the evidence shows – as the County asserted – that the type of field investigation and investigative report writing Najm performed as an investigator aide was "nonqualifying" and limited in "depth and

breadth." Aides such as Najm rarely go into the field "and do not assess the physical and/or emotional well being of their clients. Recommendations that are made do not require independent judgment as a bail deviation scale is used."

Najm's own cursory description of his experience as an investigator aide in the Los Angeles County Probation-Bail Deviation Department supports the County's conclusion he lacked the required fieldwork experience. Najm described his duties as follows: "A complete criminal history on the defendants compiled along with police agency comments. All of the information is furnished to the on duty commissioner who makes a decision on the matter of bail." That cursory statement reveals nothing about Najm's fieldwork experience, if any. Nor did the documents Congresswoman Watson submitted on Najm's behalf establish he had three years' field experience. Rather, his job bulletin described his investigator duties as "routine" and "less complex." Najm's manager, McCormick, similarly said that Najm did not have field experience. McCormick also said he could not confirm that Najm's duties are fieldwork related and are not limited to the duties listed in the job specification. McCormick said Najm does not go into the field to perform investigations but rather performs standard investigator aid duties.

Najm's dearth of qualifications for the probate court investigator position is emphasized when contrasted with those of the person, Salas, who was ultimately chosen for the job. Salas submitted a detailed application that showed she had a degree in social work and worked for DCFS. As a DCFS social worker, she had extensive field experience, namely, she went into the field to interview minors, parents, caretakers, school and medical personnel,

and counselors. Based on her work with foster care children who were undergoing psychological evaluations, Salas was familiar with medical terminology and the effects of various drugs. As a part of her job, Salas wrote about 8-10 reports per month averaging 8-15 pages in length, and she was fluent in Spanish.

In contrast, Najm's application failed to show he did any fieldwork; he did not detail his knowledge of and familiarity with medical terminology and understanding of medical diagnoses and effects of prescription drugs; his reports were only one-to-two paragraphs in length; and he did not speak any language other than English. Thus, not only did Najm fail to complete the application process, even if he did complete it, he did not establish he was qualified for the probate court investigator position.

B. *There was no evidence of a discriminatory motive.*

In addition to his failure to show he either completed the application process or was qualified for the investigator position, Najm failed to produce evidence of a discriminatory motive. Instead, as evidence of a discriminatory motive, he cited to his identification of his race and age on the Equal Employment Questionnaire, that the County gave inconsistent reasons for rejecting his application, and that the County contacted McCormick without his permission.

According to the County, when it receives applications, a receptionist logs the information on the questionnaire, and the questionnaire is thrown away. Revuelta, who reviewed Najm's application, said she was unaware of his race and age when she evaluated his application, a fact which Najm disputes. Even if we assume that the County

did know Najm's race and age, we cannot equate mere knowledge of Najm's race and age with a discriminatory motive.

Nor does the supposedly inconsistent reasons the County gave for rejecting Najm's application show a discriminatory motive. According to Najm, Revuelta told him he had the three years' field experience, but he lacked the one year of field experience working with dependent and elderly people and/or children. Thereafter, Don Heuman clarified that Najm did satisfy the one-year requirement based on his work at Wise Senior Services, but he nonetheless lacked the three years' field experience, a fact that Revuelta had also told Najm. Assuming there is an inconsistency, it does not give rise to evidence of a discriminatory motive. Whatever the County may have said about Najm's field experience, the simple fact is his application showed he did not have the requisite experience. Also, what reasons the County initially gave for rejecting Najm's application are irrelevant because the County thereafter said it would reevaluate his application and asked Najm to submit additional information, which he declined to do.

Also, that the County contacted McCormick rather than Najm's immediate supervisor does not show that the County had a discriminatory motive in rejecting Najm's application. First, it contacted McCormick *after* it had already initially rejected Najm's application and in an effort to ascertain whether Najm had qualifying experience. Second, Najm, by executing his job application, agreed to allow "all employers and institutions to release to the Los Angeles Superior Court confidential information concerning my employment." Finally, on this record, there is nothing improper about contacting Najm's manager rather

than his immediate supervisor. Indeed, it is altogether unclear how contacting McCormick shows a discriminatory motive.

We therefore conclude that Najm did not establish his prima facie case of race and age discrimination.

III. Najm did not file a timely notice of appeal from the order granting attorney fees and costs.

Najm filed his notice of appeal from "the order granting summary judgment" before the trial court had even awarded attorney fees and costs. Nonetheless, Najm purports to appeal that award of fees and costs. We hold that the appeal must be dismissed.

A postjudgment order awarding attorney fees is separately appealable. (Code Civ. Proc., § 904.1, subd. (a)(2); *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35.) The failure to appeal an appealable order ordinarily deprives the appellate court of jurisdiction to review the order. (*Praszker,* at pp. 46-47.) We cannot here deem the appeal from the order granting fees and costs to be premature. Under California Rules of Court, rule 2(e), we may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment. A notice of appeal filed before the court announces its intended ruling cannot be treated as a premature but timely notice of appeal. (*First American Title Co. v. Mirzaian* (2003) 108 Cal.App.4th 956, 960-961.)

Here, Najm filed his notice of appeal *before* the trial court awarded attorney fees. Najm also did not state in his notice of appeal that he was appealing any award of

attorney fees. Instead, the notice of appeal that he filed states it is solely from the order granting summary judgment. We therefore dismiss the appeal from the order granting attorney fees and costs.

DISPOSITION

The judgment is affirmed in part and dismissed in part. The appeal from the order granting attorney fees and costs is dismissed. The judgment is otherwise affirmed. Respondent is to recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.

APPENDIX B

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

SHAMS Q. NAJM, Plaintiff, v. COUNTY OF LOS ANGELES; LOS ANGELES COUNTY SUPERIOR COURT; and DOES 1 through 100, Inclusive, Defendants.	CASE NO. BC294436 **ASSIGNED FOR ALL PURPOSES TO:** Department C25 **JUDGMENT BY COURT IN FAVOR OF DEFENDANT SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES AND AGAINST PLAINTIFF SHAMS Q. NAJM** (Filed Sep. 23, 2004)

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT

The Court, having issued an order dated May 13, 2004, granting defendant Superior Court of California. County of Los Angeles' ("Superior Court") Motion for Summary Judgment and having issued its ruling on July 27, 2004, granting the Superior Court's Motion for Attorneys' Fees and Costs awarding to Superior Court its attorneys' fees in the total amount of $65,280.00 and costs in the total amount of $1,106.54 against plaintiff Shams Q. Najm, HEREBY ENTERS JUDGMENT in favor of defendant Superior Court of California, County of Los Angeles and against plaintiff Shams Q. Najm, thereby dismissing plaintiff's action in its entirety. Plaintiff Shams

Q. Najm shall take nothing and defendant Superior Court of California, County of Los Angeles shall recover from plaintiff Shams Q. Najm its attorneys' fees and costs in the total amount of $66,386.54.

Dated: 9-23-04

/s/ David R. Chaffee
JUDGE OF THE SUPERIOR COURT

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

SHAMS Q. NAJM, Plaintiff, v. COUNTY OF LOS ANGELES; LOS ANGELES COUNTY SUPERIOR COURT; and DOES 1 through 100, Inclusive, Defendants.	CASE NO. BC294436 **ASSIGNED FOR ALL PURPOSES TO:** Judge David R. Chaffee, C25, Orange County **ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES** (Filed May 13, 2004)

On April 20, 2004, defendant Superior Court of the State of California, County of Los Angeles' ("Superior Court") motion for summary judgment or, in the alternative, summary adjudication, came on for hearing in Department C25 of the Orange County Superior Court, Judge David R. Chaffee presiding. John Henrichs appeared on behalf of plaintiff Shams Q. Najm ("Najm") and Fred Plevin appeared on behalf of the Superior Court.

After full consideration of the evidence and papers submitted by counsel in connection with the motion for summary judgment or, in the alternative, summary adjudication, as well as oral argument thereon, the Court makes the following rulings.

The Court hereby sustains the Superior Court's objections to (1) Najm's Exhibits I and J, in their entirety;

(2) the statement, "I met all the requirements for a Probate Investigator" contained in paragraph 4 of Najm's declaration; (3) the statement, "I also met the three-year field investigator requirement" contained in paragraph 5 of Najm's declaration; (4) the statement, "In response, on or about September 18, 2001, Don Heuman, stated that Ms. Revuelta reevaluated my experience and stated it satisfied the requirements in the job announcement" contained in paragraph 11 of Najm's declaration; (5) the statement, "Attached to the [Watson] letter were documents recommending me and highlighting my experience and qualifications for the Probate investigator position with defendants" contained in paragraph 12 of Najm's declaration; and (6) Najm's Exhibit F, in its entirety. The Court hereby overrules the Superior Court's objections to (1) the first paragraph of the response to item 7 on page 2 of Najm's Exhibit I; (2) the first paragraph on page 2 of Najm's Exhibit J; (3) the statement, "In my current position . . . representing elders in senior care" contained in paragraph 5 of Najm's declaration.

With respect to defendant's motion for summary judgment, the Court finds that there is no triable issue of material fact in this action and the Superior Court is entitled to summary judgment as a matter of law. This ruling is made on the ground that Najm failed to establish a prima facie case of race or age discrimination in violation of the Fair Employment and Housing Act ("FEHA"). More specifically, the Court finds, based on undisputed facts presented in the motion, that (1) Najm failed to complete the application process for the position he sought, (2) Najm was not qualified for the position he sought, (3) the person hired for the position Najm sought was more qualified,

and (4) there is no evidence suggesting any discriminatory motive on the part of the Superior Court.

Finally, because the Court finds that the parties did not comply with California Rules of Court, Rule 342(b), the Court does not specifically rule on the Superior Court's motion for summary adjudication.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Motion for Summary Judgment filed by Defendant Superior Court of the State of California, County of Los Angeles is GRANTED and that judgment shall be entered in favor of defendant Superior Court of the State of California, County of Los Angeles and against plaintiff Shams Q. Najm. As the prevailing party, defendant Superior Court shall be entitled to its costs of suit.

Dated: MAY 13 2004

/s/ David R. Chaffee
HON. DAVID R. CHAFFEE
Judge of the Superior Court

APPENDIX D

Court of Appeal, Second Appellate District,
Div. 3 – No. B176724
S143549

IN THE SUPREME COURT OF CALIFORNIA

En Banc

(Filed Jun. 28, 2006)

SHAMS Q. NAJM, Plaintiff and Appellant,

v.

SUPERIOR COURT LOS ANGELES COUNTY,
Defendant and Respondent.

Request for judicial notice denied.

Petition for review DENIED.

GEORGE
Chief Justice

APPENDIX E

[SEAL]

State of California
Commission on Judicial Performance
455 Golden Gate Avenue, Suite 14400
San Francisco, CA 94102-3660
(415) 557-1200
FAX (415) 557-1266
Web Site: http://cjp.ca.gov

August 2, 2006

Sylvia Castillo, District Director
Office of Assemblymember Karen Bass
47th Assembly District
5750 Wilshire Blvd., Ste. 565
Los Angeles, CA 90036

Dear Ms. Castillo:

We have received a request from Theresa Hayes of your office for information concerning a complaint reportedly filed by Shams Q. Najm with our office. Please be advised that Commission Rule 102 requires that all papers filed with and investigations by the commission shall be confidential. Although we are unable to apprise you of any action taken in this matter, we shall advise the complainant when the commission makes a final determination.

I am enclosing for your office copies of our information pamphlet. I hope you find these of interest.

Very truly yours,

/s/ Victoria B. Henley
Victoria B. Henley
Director-Chief Counsel

VBH:bmt/L0802castillo

Enclosures

APPENDIX F

[SEAL]

State of California
Commission on Judicial Performance
455 Golden Gate Avenue, Suite 14400
San Francisco, CA 94102-3660
(415) 557-1200
FAX (415) 557-1266
Web Site: http://cjp.ca.gov

August 29, 2006

Shams Q. Najm
5586 Village Green
Los Angeles, CA 90016

Dear Mr. Najm:

At its August meeting, the Commission on Judicial Performance determined not to take further action with respect to your complaint dated May 11, 2006.

After considering all the information before it about this matter, the commission concluded that your complaint does not provide grounds for proceeding further. No support for any allegation of impropriety by the judge you named has been uncovered. Therefore, no further action will be taken on your complaint.

We do appreciate your time and effort in bringing this matter to the commission's attention.

Very truly yours,

/s/ Colette Brooks
Colette Brooks
Staff Counsel

CB:ej/10829najm